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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1959

No. 393

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN and BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

v.

SWITCHMEN'S UNION OF NORTH AMERICA and CENTRAL OF GEORGIA RAILWAY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For the Fifth Circuit

BENNING M. GRICE
Bankers Insurance Building
Macon, Georgia
V. CRAVEN SHUTTLEWORTH
Merchants National Bank Building
Cedar Rapids, Iowa
HARRY E. WILMARTH
Merchants National Bank Building
Cedar Rapids, Iowa
WAYLAND K. SULLIVAN
Standard Building
Cleveland 13, Ohio
Counsel for Petitioners

September 9, 1959

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Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above stated case on June 30, 1959.

OPINIONS BELOW

The opinion of the District Court for the Middle District of Georgia (R. 465) is not yet reported. The opinion of

the Court of Appeals for the Fifth Circuit (R. 512) not yet reported, is printed in the Appendix, pages 1A to 15A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on June 30, 1959 (R. 527), and a copy thereof is appended to this petition in the Appendix at page 16A. A petition for rehearing was denied on August 10, 1959 (R. 558), and a copy of said order is appended to this petition in the Appendix at page 17A. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

In a consolidated action transferred to the Middle District of Georgia petitioners sought to have declared invalid an agreement providing for certain railroad yard work entered into between the two respondents on March 14, 1958. They attacked the same upon the several grounds including (1) that there was no notice given under Section 6 of the Railway Labor Act (45 U.S.C. Sec. 156), and (2) that the respondent Switchmen's Union of North America was not authorized to make such an agreement which affects the rights of the two road crafts' employees represented by petitioners. The respondents contended that the contract is valid. The District Court held with respondents and the Court of Appeals for the Fifth Circuit affirmed.

The questions presented are these:

1. May two railway labor organizations as representatives under the Railway Labor Act for the members of their road crafts, after a different organization has been certified by the National Mediation Board as representative for the craft of yardmen, bargain for continuance of their previous-

ly made agreements and established practices with the Railroad for such road crafts to supply the men to perform the yard work at four places on the Railroad?

2. Are such road craft representatives entitled to a notice under Section 6 of said Act of the Railroad's intended change in the agreements and practices which these representatives have with the Railroad for such road crafts to supply the men to perform the yard work at four places after the National Mediation Board has certified a different organization as representative of the craft of yardmen on the Railroad?

STATUTES INVOLVED

The statutory law involved is the Railway Labor Act (45 U.S.C. Sections 151, 152, 156). The pertinent portions of these are printed in the Appendix at pages 18A to 21A.

STATEMENT

This action arose over the supplying of men to perform yard service for the respondent Railroad in four localities, Rome, Cedartown, Athens and Griffin, Georgia. Petitioners seek continued performance of certain agreements and practices which they have with this Railroad, rather than abrogation by a purported agreement which the Railroad subsequently entered into with the other respondent covering the same subject matter. Petitioners, Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen, sometimes referred to herein as ORC&B and BRT, or Conductors and Trainmen, contend that their collective agreements and practices, made by them as representatives for the crafts of road conductors and road trainmen, respectively, several years ago with the Railroad, con-

tinue in force and entitle their road crafts' men to this work.[1] On the other hand, the respondent Switchmen's Union of North America, sometimes referred to herein as SUNA or Switchmen, contends that its recent agreement of March 14, 1958, made shortly after its certification by the National Mediation Board as successor to BRT as representative of the yardmen on said Railroad, provides it with the right to supply the men for such work. Approximately 187 employees are involved. The controversy does not concern the work at any other places on the Railroad.

From the time that the foregoing agreements and practices were entered into and established and to the present ORC&B has continued to serve as representative under the Railway Labor Act for the craft of road conductors. When such agreements and practices were entered into and established and until May 25, 1956, BRT served as such representative for not only road trainmen but also yardmen. But as of that date SUNA was certified by the National Mediation Board as representative for the craft of yardmen (foremen and switchmen) employees of the respondent Railroad (R. 7-9). BRT, nevertheless, continued to hold the representation for road trainmen.

Soon after its certification for yardmen SUNA entered into a system-wide collective bargaining agreement with the Railroad, the same being a "Schedule of Pay and Regulations for Switchmen Represented by Switchmen's Union of North America." This agreement is not involved in this

1. At Rome a 1952 contract between ORC&B and BRT and the Railroad provides that they, roadmen, do that work (R. 42). At Cedartown a 1946 agreement between BRT and the Railroad specifies the same there (R. 44) and by common consent and ratification the same has applied to ORC&B. At Griffin another 1952 contract, between BRT and the Railroad, recites that the extra work there is performed by such roadmen (R. 46). For Athens the same 1952 Griffin agreement sets forth that extra yard work is done by the Trainmen and the regular yard work is done by them in accordance with established practice. Each of these agreements recites that it shall remain in effect subject to the provisions of the Railway Labor Act.

controversy. Following that, SUNA began efforts to supply the yard work at Rome, Cedartown, Athens and Griffin. Accordingly, on September 28, 1956, the Railroad served a Section 6 notice under the Railway Labor Act upon ORC&B and BRT (R. 433), giving "official notice as required by the Railway Labor Act" of its desire to cancel all agreements and practices relating to road conductors and road trainmen doing yard work at those four places (and at Augusta, Georgia, which is not involved here). However, after conferences among these parties the Railroad on November 21, 1956, expressly withdrew its Section 6 notice (R. 435). From the giving and subsequent withdrawal of the Section 6 notice to them, ORC&B and BRT considered the matter closed but if it should be re-opened another Section 6 notice would be given (R. 231, 232). From November 21, 1956, until March 14, 1958, the Railroad did not communicate to either ORC&B or BRT any contention or position that they, as representatives of the road crafts of conductors and trainmen, did not have a right to negotiate with the Railroad on this issue.

However, in the meantime mediation proceedings took place between SUNA and the Railroad only over SUNA's claim to supply the yard work at these four places. But at no time were ORC&B and BRT involved or advised of these proceedings, which were conducted in the face of a strike date, February 28, 1958.

On March 14, 1958 under these circumstances, the Railroad yielded and without giving a Section Six notice entered into an agreement with SUNA, providing for the yard work at Rome, Cedartown, Athens and Griffin to be performed by men to be supplied by it rather than by such crafts of road conductors and road trainmen pursuant to their agreements and practices above referred to (R. 46). Immediate protest to the Railroad by ORC&B and BRT

caused it to defer effectiveness of this agreement and it so advised SUNA (R. 13). Thereupon SUNA instituted court action seeking to require immediate application of its new agreement (R. 2). However, ORC&B and BRT intervened, asking the court to declare it invalid (R. 29), upon grounds including (1) failure to provide the Section 6 notice and (2) lack of authority for such yard craft representative to contract away road crafts rights. The trial court had jurisdiction by reason of the commerce provision of Title 28 Sec. 1337 of the U.S. Code, the action arising under the Railway Labor Act. There were no issues for determination by the administrative boards established by the Act, the validity of the contract being the issue. In their pleading they made known the consequences of the SUNA agreement's application, especially the damage to seniority rights of those doing yard work who by its terms would be restricted to it and of those also doing road work who under it would be denied the right to serve in the yard in accordance with their road seniority; and they plead also the general chaotic impact upon the entire seniority system of the Railroad. Their pleading was twice amended (R. 95, 463).

Upon the trial all of the foregoing facts were established without dispute.[2]

The issues were decided on the evidence, motions to dismiss having been carried over. The judgment of the District Court entered on September 5, 1958, declared the agreement between SUNA and the Railroad valid, and denied all prayers of ORC&B and BRT to void it (R. 465).

Petitioners then appealed to the Court of Appeals for the Fifth Circuit. That court affirmed the District Court (Appendix, p. 16A, R. 527). Its opinion (Appendix p. 1A,

2 The Railroad took the position of the Switchmen and also relied upon a telegram from the Mediation Board, in response to the Railroad's inquiry, which it construed to require it to deal only with SUNA (R. 459). The admissibility and interpretation of such telegram were denied by ORC&B and BRT (R. 191).

R. 512) shows that it made two holdings. The first was that because of its 1956 certification as successor to BRT as representative of yard employees, SUNA had the exclusive right to bargain with the Railroad for the yard work in question; and *second*, that, therefore, ORC&B and BRT had no right to a Section 6 notice.

In the first holding it emphasized the right to bargain as it related to the necessity for the Section 6 notice, and held that upon SUNA's certification and in view of Section 2, Ninth, it was the only representative with whom the Railroad could bargain and thus make a contract for the work in question, which is yard work; and that "as to that work SUNA alone may bargain," even though "it may effect those who, while generally roadmen, perform yard work, full or part time." (R. 519)

Its second holding was predicated upon the first. Having already held that SUNA alone had the authority to bargain for yard work, it concluded that no other representative such as ORC&B or BRT was entitled to a Section 6 notice. It construed this Section so as to limit the notice requirement to that certified bargaining representative and no other, again emphasizing the duty imposed by Section 2, Ninth, for the Railroad to treat with only the certified representative. Having reached the conclusion that ORC&B and BRT had no right to notice since they could not negotiate, it added that they were not entitled to confer.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed because it erroneously interprets the Railway Labor Act so as to disrupt the orderly administration relating to negotiation of disputes, one of the cardinal processes which the Act employs to fulfill its objectives. The character of reasons for granting the writ as expressed in Rule 19 are pre-

sent here, to-wit: the decision of the court below has decided important questions of federal law which have not been but should be settled by this Court; also it is in conflict with the decisions of other courts of appeal on the same matter. Each of these considerations governing review on certiorari will be specifically treated in that order.

IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The Court of Appeals misinterpreted and misapplied the Railway Labor Act in holding that ORC&B and BRT, as craft representatives for road conductors and road trainmen respectively, could not after SUNA's certification as craft representative for yardmen, bargain for continuance of ORC&B and BRT's agreements and practices with the Railroad for such road crafts to be the source of supply for the yard work at these four places.

Also, it misinterpreted and misapplied such Act in holding that ORC&B and BRT, as craft representatives for road conductors and road trainmen repectively, were not entitled to a notice under Section 6 of said Act of the Railroad's intended change in the agreements and practices which ORC&B and BRT had with the Railroad for such road crafts to provide the men for the yard work at the four places.

The questions involve the scope of authority of the craft representative, and the extent of the duty to provide the Section 6 notice. There is no decision by this Court on either of these two questions.

Both questions are of the utmost importance in the negotiation of railway labor agreements, and affect not only the 187 men involved at these four places on this particular Railroad, but are of vital concern to the many railway labor

organizations now serving as craft representatives under the Railway Labor Act, the numerous railway managements, the approximately one million railway employees, and the countless American public involved in railway passenger and freight transportation.

Authority of the Craft Representative

Before proceeding further it is well to establish the corner stones of petitioners' position. They are these:

ONE. Appellants ORC&B and BRT are representatives, under the Railway Labor Act, of the crafts of *road* conductors and *road* trainmen, respectively. They do not represent *yard* craft employees. Those are represented by SUNA under its recent Mediation Board certificate.

TWO. These road conductors and road trainmen have, by virtue of their written agreements and practices at the four named localities on this Railroad, certain established rights. In addition to their seniority rights to man jobs on the *road* they also have the right to perform, in accordance with their seniority standing on the respective rosters for road conductors and road trainmen, the *yard* work at Rome, Cedartown, Athens and Griffin. To each of these employees this is a valuable right which he has earned by his seniority as a roadman. These rights do not pertain to any other points on the Railroad.

THREE. The rights of these road craft men to perform this yard work are *affected* in this dispute. Abrogation of their rights as roadmen, established by their contracts and practices at the four places, seriously threatens their employment and income. Those 12 employees now doing yard work, due to its uncertainty and possible elimination, do not desire to be restricted to it in these four areas. Neither

do those 175 men who are now performing road work and whose standing on the road seniority rosters entitles them to bid on such yard work, wish to forfeit that. Thus any election, under the new SUNA contract, would thus narrow their employment opportunities. Many men would be displaced from their present assignments in the seniority scramble ensuing from any such new contract going into effect.

FOUR. Appellants, as representatives for these crafts of road conductors and road trainmen, not SUNA, have the authority to bargain for them as to their rights to this yard work. Appellants do not represent these employees by reason of their membership in any labor organization. Union membership is immaterial here.

In the light of the foregoing, any negotiation over the supplying of the men to perform this yard work at Rome, Cedartown, Athens, and Griffin, should have taken place among representatives of the crafts whose rights would be affected thereby. At the conference table there should have been (1) SUNA representing the craft of yardmen, (2) ORC&B and BRT representing the crafts of road conductors and road trainmen, and (3) the Railroad. This is in keeping with the Railway Labor Act's all important Section 2, Second, dealing with negotiation.[3]

The thread of craft and craft representation runs throughout the entire Act. The duty to represent the particular craft is found in Section 2, Fourth. The limits of craft representation are not new. They have been in the Railway

3 This section provides that "All disputes between a carrier or carriers and its or their employees shall be considered, and if possible, decided, with all expedition, in conference between *representatives designated* and *authorized* so to confer, respectively, by the carrier or carriers and by the employees thereof *interested* in the dispute." (Emphasis supplied) The term "representatives" is defined in Section 1, Sixth, as "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees to act for it or them."

Labor Act for many years, have been long recognized by the courts and have been continually carried out in railroad practices.

But the recent decision by the Court of Appeals in this case is indeed a new departure in this respect. To hold that since the work in question is yard work, "SUNA alone may bargain" and thus contract away road crafts' rights to perform it here is indeed a new concept. It overlooks the fact that after SUNA's certification as craft representative for yardmen, ORCxB and BRT continue to serve as craft representatives for road conductors and road trainmen, that this continued representation is as to *crafts*, not union membership in ORCxB and BRT.[1] The decision below did not make any reference whatever to the authorities which petitioners believe are applicable. Those cases hold that a union which is the craft representative for employees having the right by its agreements or practices to perform work in another craft have the right to bargain on behalf of its own craft for the continuance of the right to such work. References to these follow.

This same Court of Appeals in *General Committee of Adjustment of BLE v. Missouri-Kansas-Texas Ry. Co.*, 132 F.2d 91 (reversed by this Court upon other grounds, 320 U.S. 323), did *not* hold that because BLE was representative of the engineers' craft it had exclusive right to negotiate for engineers' work. The dispute there was whether BLE or BLFxE had the exclusive right to bargain with the railroad over the calling of firemen to work as engineers

1. This no doubt caused the erroneous holding since the opinion is replete with numerous references to membership, members of, or belonging to a labor union, such references occurring at crucial places in the reasoning of the opinion. This misconception is also apparent by the court's reliance upon such authorities as *Brotherhood of Railroad Trainmen v. North*, 251 F.2d 282 and *Switchmen's Union of North America v. Southern Pacific Co.*, 253 F.2d 81.

in emergency service. Instead, it held that since both the engineers' and firemen's crafts were affected, the representative of both, BLE and BLFxE, had rights to bargain with the railroad.

Also in *Brotherhood of Railroad Trainmen v. Howard*, 190 F.2d. 442, 8th Cir. (affirmed 343 U.S. 768; upon other grounds, but not disturbing the one here), that Court of Appeals held directly opposite to this one. There, the porters, who had a craft representative, by long established practice had also supplied the men to work as brakemen, which craft was represented by BRT. There, the railroad negotiated solely with the brakemen's union and made a contract which would require that only men from the brakemen's craft perform brakemen's work, thus eliminating the porters from doing it. That court did *not* hold because it was brakemen's work that the railroad could bargain only with the brakemen's representative and thus contract away rights of the porters' craft. Instead, it held that the porters' craft had established rights to the brakemen's work, for it ruled that a Section 6 notice should have been given before there could be the change sought by the brakemen's craft representative. This ground of the contract's invalidity was not required to be passed upon by the Supreme Court since it decided the case upon another ground. But it left that one undisturbed, as is evidenced by its footnote 1 making reference to that holding of the Court of Appeals now being discussed.

Another is *Rollins v. Dwellingtom*, 198 F.2d. 594, 8th Cir. There waiters-in-charge, by long established custom and usage with the railroad, also performed stewards' work in dining cars. By holding that a Section 6 notice was thus due, the court there ruled that the stewards did not have exclusive authority to bargain and negotiate a contract for stewards' work with the railroad.

Finally, even *Brotherhood of Railroad Trainmen v. Smith*, supra, which this Court of Appeals employed as the basis for its emphasis on union membership, is consistent with three decisions just referred to. There, the Sixth Circuit court held that the trainmen's organization, BRT, could not negotiate with the railroad as to "conductors' rights" where those men, as here, worked in both crafts.

A district court case significantly recognizes the rule that the representative of a particular craft cannot negotiate with management and make agreements which affect the rules, rates of pay, or working conditions of any other craft, *Shipley v. Pittsburgh & L. R. Co.*, 83 F. Supp. 722, 751.

The cases referred to immediately above also show that in its departure the Court of Appeals here erroneously applied Section 2, Ninth, of the Railway Labor Act which provides, among others, that upon receipt of the Mediation Board certificate "the carrier shall treat with the representative of the craft or class for the purposes of this chapter." But the duty to treat with the certified representative of the craft does not mean bargaining with that representative as to rights possessed by other crafts which have their own representatives, here ORC&B and BRT. This is borne out by the holdings just referred to in the same cases. In each of them the railroad had the same duty to deal with the certified representative. Yet since there were rights of other crafts involved, those courts held that this required bargaining also with the representatives of those other crafts. Here ORC&B and BRT were not claiming the right to represent the craft of yardmen. That was SCNW's prerogative. ORC&B and BRT represented crafts which, by their established contracts and practices, have the rights, as roadmen, to perform yard work at those four places. They, too, must be treated with by the Railroad under the same Section 2, Ninth, because they represent other crafts whose rights are

involved and about to be affected. The true spirit of bargaining, as invisioned by the Railway Labor Act, requires those crafts whose rights are affected to be represented at the conference table as "interested" under Sec. 2, Fourth.

Further proof of the Court of Appeals' error here is what occurs on the railroads every day. Perhaps the most common illustration is the practice suggested by the *M-K-T* case, supra. There, as on all class I railroads, firemen's work is not performed entirely by men who belong exclusively to the firemen's craft. A great deal of it is done by men from the engineers' craft, who when their engineer work is slack go back to firing, thus becoming a "demoted engineer" or an "engineer back firing." This they do because of either a contract or a practice with the railroad. Where there is an agreement it is made by the engineers' craft representative with the railroad. Yet the *firemen's* craft representative has a contract with the railroad for firemen's *work*, to-wit, the "Firemen's Schedule" or "Firemen's Contract" for rules, rates of pay and working conditions. Obviously, in that situation, even with its Mediation Board certificate the firemen's craft representative does not have the exclusive authority to bargain with the railroad for firemen's work. By a contract, as here, the members of another craft have rights or interests in the supplying of the men to perform the particular work.

Another such illustration appears from the facts contained in this record. Many of the roadmen here float from one craft to another. Conductors, for instance, work and hold seniority in their own craft as well as in the trainmen's craft, pursuant to separate contracts between each of those representatives and the railroad (R. 283, 284). In this situation, even though BRT is the certified representative of the trainmen's craft, for this trainmen's work, the conductors' craft, by a contract made on their behalf by ORC&B, have

the right to supply a portion of the men for *trainmen's work*. Here again, the Mediation Board certificate of one craft, while it authorizes the making of a *general* collective bargaining agreement or schedule, does not give it the exclusive authority to bargain with the railroad for that particular work where there are outstanding agreements with other crafts.

Thus, from the foregoing decisions and illustrations from actual railroad practice it is clear that, except for the Fifth Circuit Court of Appeals' decision in the instant case, it is well recognized that a railway labor craft representative cannot bargain beyond the limits of its own craft.

This Court has never passed upon this question, which is indeed one of substance and importance. The instant Court of Appeals' decision, if allowed to stand, will create uncertainty as to the many railway labor contracts and will be unconducive to orderly settlement of disputes of major consequence. Therefore, this Court should for this reason alone grant the writ.

The Requirement of a Section 6 Notice

Petitioners' position here is that ORC&B and BRT, as craft representatives for road conductors and road trainmen respectively, were entitled to a notice under Section 6 of the Act of the Railroad's intended change in the agreements and practices which they, as representatives of those crafts, had with the Railroad to supply the men for the yard work at the four places. Had the notice been given negotiation, as contemplated by the Act, would have no doubt taken place among the yard and road crafts and Railroad over the controversy, instead of this litigation.

This provision is as important as any in the Railway

Labor Act.[5] It starts the movement of the machinery which Congress has set up to adjust disputes and thus avoid interruption of railroad commerce—the processes of negotiation, mediation and arbitration. Cases have uniformly held that failure to provide it leaves the original agreement in force.[6]

Section 6 does not specify to whom the notice must be given other than reciting that those "interested" shall agree upon a conference date and place. But this is proof of its intended generality to include all crafts which are interested or concerned in the particular dispute. There is no decision by this Court on this question. Throughout its long presence in the Act the interpretation of the section, as to who should be notified, has been broad, both in the reported cases and in actual railroad practice.

Here the Court of Appeals made another recent departure from the accepted interpretation. Its holding that the notice need be given only to the representative of the craft having the bargaining authority for the work actually involved in the proposed change is indeed too narrow and too fine. It expressly rejected the interpretation to include those are "interested" or whose rights would be affected by the change.[7]

5 Section 156, known as Section 6, provides that "carriers and representatives of the employees shall give at least thirty days' written notice of intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice . . ." Section 152, Seventh, requires compliance with this section, and its violation is made penal by Section 152, Tenth.

6 For instance, *Chicago North Shore R. Co. v. Bell*, 147 F. 2d 723, 7th Cir.; *Burke v. Murphy*, 109 F. 2d 572, 2nd Cir., certiorari denied in both

7 Here also, the court below apparently overlooked that after SUNY's certification as craft representative for Yardmen ORC&B and BRT continued to serve as craft representatives for road conductors and road trainmen, and that this continued representation was that of road craft employees instead of mere members of said two unions. This, too, is evident from the repeated stress of the mistaken fact of ORC&B and BRT's reliance upon union membership as requiring notice of such intended change. Also, this is obvious from employment of *McMullins v. Kansas, O. & G. Ry.*, 229 F. 2d 50, 10th

This Court of Appeals' decision is the first instance, insofar as petitioners find from the reported cases, that there has been any such restriction upon those entitled to the notice.[8]

In *Burke v. Morphy*, 109 F.2d. 572, the Second Circuit Court of Appeals held that the Act requires that notice must be given "to the other party to the agreement." In the *Roltes* case, supra, 198 F.2d. 597, the Eighth Circuit Court required it given the waiters-in-charge who, by long standing custom and usage, had been performing dining car stewards' duties. Perhaps the clearest illustration that the notice is required in a situation such as the one at bar is the decision of the Court of Appeals for the Sixth Circuit in *Brotherhood of Railroad Trainmen v. Howard*, 191 F.2d. 122, already referred to in discussion of the first question. Even though BRT represented the craft of *brakemen*, and it was *brakemen's* work, that Court of Appeals affirmed the District Court's ruling that notice should have been given. This Court also affirmed, upon the ground that the proposed contract was racially discriminatory and void. But it did not disturb the Court of Appeals' ruling on failure

Co., holding that members of a union are not entitled to a Section 6 notice since their representative acts for them, and citing again the *South* and *Atlanta Pacific* cases, supra, for the statement that "as to actual work of a kind committed to another craft, such uncertified union may not, it cannot, legally negotiate for its members." No claim is made by petitioners to a Section 6 notice because of membership in any union.

8. The notice need not be given to individual members of the class or craft where there is a representative acting for them. *McMullen v. K. O. S. & G. R. Co.*, 229 F. 2d. 50; also *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, a case originating under the same section as it appeared in the 1926 Act. Also where the Mediation Board has certified a representative, and pending Mediation proceedings, a "dummy" organization is created to represent the *same* class or craft of employees, the Railroad must give notice to such certified one. *Railway Employees Co-op. Ass'n. v. Atlanta B. & C. R. Co.*, 22 F. Supp. 549 (N. D. Ga.)

to give the notice as this Court's opinion in footnote 4 states."

The practical employment and necessity of broad interpretation as to notice according to Section 6 is well illustrated by what happened in the instant case. Here, the conduct of the respondents, in addition to the language of Section 6 itself, constitutes a second reason why notice should have been given. The Court of Appeals failed to mention this feature. The Railroad and SUNA recognized that this notice was required. Actually the Railroad originally gave a Section 6 notice to petitioners when this same dispute first arose, by letter of September 28, 1956 (R. 433), and it subsequently withdrew the Section 6 notice, November 21, 1956 (R. 435). Furthermore, SUNA in its January 10, 1958, letter to its members (R. 437, 439) referred to the Railroad's Section 6 notice as "proper procedure." From November 21, 1956, until the new contract with SUNA signed on March 14, 1958, the Railroad did not communicate to ORC&B and BRT any contention or position that such organizations did not have a right to negotiate with it on this issue. Therefore, petitioners assumed that the matter was closed but if reopened a Section 6 notice would be given (R. 231, 232). They were surprised to learn from the Railroad's letter of the agreement with SUNA (R. 444). Whatever had taken place in mediation proceedings between the Railroad and SUNA as to ORC&B and BRT's non-participation was never communicated to petitioners, who continued in their reliance upon a Section 6 notice if and when the issue would be reopened. Thus the Railroad

9. Footnote 4 of the opinion stated this: "One part of the District Court's order was affirmed. The Court of Appeals held that the District Court had properly enjoined the Railroad from abolishing the position of 'train porters' under the notices given, on the ground that these notices were insufficient to meet the requirements of Sec. 2, Seventh, and Sec. 6 of the Railway Labor Act. The view we take makes it unnecessary for us consider this question."

and SCNA are estopped to contend that no Section 6 notice was required.

The representatives of road crafts of conductors and trainmen, whose jobs were in jeopardy, were certainly "interested" in the dispute. Therefore, by reason of either the express provisions of the statute or the conduct of the respondents a duty to give the notice of Section 6 existed.

There is a need for a decision by this Court as to which agent should receive this Section 6 notice. For this the same reasons recited in the previous question, the authority of the bargaining representative, apply equally here.

CONFLICTING DECISIONS BY DIFFERENT COURTS OF APPEAL

On the two questions decided by the Court of Appeals for the Fifth Circuit there is a definite conflict between them and those of other Courts of Appeal.

First, the decision of the Fifth Circuit Court here as to both questions, the authority of the bargaining agent and the giving of the Section 6 notice, is contrary to the Eighth Circuit Court of Appeals in *Brotherhood of Railroad Trainmen v. Howard*, 191 F.2d. 712, which decision this Court did not disturb, and also to the Eighth Circuit in *Rolfes v. Darlington*, 198 F.2d. 591.

Furthermore, this decision of the Fifth Circuit Court on the first question: the authority of the bargaining agent, is contrary to that rendered by the Sixth Circuit Court in *Brotherhood of Railroad Trainmen v. Smith*, 251 F.2d. 282, specifically forbidding any negotiation which affects rights of another craft.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

BENNING M. GRICE

P. O. Address:
Bankers Ins. Bldg.
Macon, Georgia

V CRAVEN SHUTTLEWORTH

Merchants Nat'l Bank Bldg.
Cedar Rapids, Iowa

HARRY E. WILMARTH

Merchants Nat'l Bank Bldg.
Cedar Rapids, Iowa

WAYLAND K. SULLIVAN

Standard Building
Cleveland 13, Ohio

Counsel for Petitioners

APPENDIX

OPINION OF THE COURT OF APPEALS
IN THE

UNITED STATES
COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 17,588

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN AND BROTHERHOOD OF RAILROAD TRAINMEN,

Appellants.

versus

SWITCHMEN'S UNION OF NORTH AMERICA, et al.,

Appellees.

Appeal from the United States District Court for the Middle District of Georgia

(June 30, 1959.)

Before JONES, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: The cases arises under the Railway Labor Act, 45 USCA §§151-163.[1] Specifically, the

1. The Railway Labor Act, found at Section 151-163 of 45 USC, 45 USCA, was originally enacted in 1926, 44 Stat. 577, and has, of course, undergone occasional amendment since that time. Sections 181-188 generally apply the

question is whether a contract between the Railroad and SUNA for yard work at certain Georgia stations is invalid because the Railroad failed to give a Section 6 notice, 45 USCA §156, to BRT and ORCB.[2]

In a consolidated proceeding the District Court held the SUNA contract valid. BRT and ORCB appeal, contending that the agreement is invalid and its enforcement should have been enjoined. Admittedly no Section 6 notice[3] was given by the Railroad to BRT or ORCB, and, if required,

Act to carriers by air. The original section numbers, which have been used throughout this opinion, have been carried into the Code in a 150 series, e.g., §1 is 45 USCA §151, §6 is §156, etc., and may be readily found in that way. However, the sections of the Act possess the unfortunate, and somewhat distinctive, characteristic of having their subsections designated by ordinal numbers, e.g., §151 Fifth, §152 Eleventh, etc., rather than, e.g., §151 5th, or §152 eleventh, §152 11th, or §152 k). Nevertheless, we have retained this statutory scheme throughout the opinion, too.

2 The parties are:
Railroad: Central of Georgia Railway Company
SUNA: Switchmen's Union of North America
BRT: Brotherhood of Railroad Trainmen
ORCB: Order of Railway Conductors and Brakemen

3 Section 6, 45 USCA §156, provides:
"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

the contract is invalid,[4] leaving the prior agreements (or practices) in effect. All are in agreement, with which we concur, that the case poses a genuine issue as to validity, not interpretation, so that on these and other authorities, it is one for judicial consideration.[5]

I.

The Bargaining Representative

The case comes into being primarily because there was a change in 1956 in the bargaining representative for yard work (switching and foremen). Prior to that time BRT was the bargaining agent. In 1956, the Mediation Board conducted an election, Section 2-Ninth, 45 USCA §152-Ninth,[6] as a result of which SUNA was certified as having

4. Brotherhood of Locomotive Firemen and Enginemen v. Chicago N.S. & M. R.R., 7 Cir., 1945, 147 F.2d 723, cert. denied, 325 U.S. 852, 65 S.Ct. 1089, 89 L.Ed. 1973; Burke v. Morphy, 2 Cir., 1940, 109 F.2d 572, cert. denied, 310 U.S. 635, . . . S.Ct. . . . , 84 L.Ed. 1404; Railroad Yardmasters of America v. Pennsylvania R.R., 3 Cir., 1955, 224 F.2d 226; Roltes Dwellingham, 8 Cir., 1952, 198 F.2d 591.

5. Virginian Ry. v. System Federation No. 40 AFL, 1937, 300 U.S. 515, 545, n. 3, 57 S.Ct. 592, 81 L.Ed. 789; Steele v. Louisville & N. R.R., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 1944, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187; Brotherhood of Railroad Trainmen v. Howard, 1952, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1288; Mount v. Grand Int'l Brotherhood of Locomotive Engineers, 6 Cir., 1955, 226 F.2d 604, cert. denied, 350 U.S. 967, . . . S.Ct. . . . , 100 L.Ed. 839; Brotherhood of Railroad Trainmen v. Smith, 6 Cir., 1958, 251 F.2d 282, cert. denied, 356 U.S. 937, 78 S.Ct. 778, 2 L.Ed.2d 812; Pellicer v. Brotherhood of Railway and Steamship Clerks, S.D.Fla., 1953, 118 F.Supp. 254, affirmed, 5 Cir., 1954, 217 F.2d 205; Hettenbaugh v. Airline Pilots Ass'n Int'l, 5 Cir., 1951, 189 F.2d 319; Alabaugh v. Baltimore & O. R.R., 4 Cir., 1955, 222 F.2d 861, cert. denied, 350 U.S. 839, 76 S.Ct. 77, 100 L.Ed. 748.

6. Section 2 (§152)-Ninth provides that it shall be the duty of the Mediation Board to certify the organizations that have been designated and authorized to represent the employees. The certification by the Mediation Board is not

"been duly designated and authorized to represent, for the purposes of the Railway Labor Act, the craft or class of Yardmen (Foremen, Switchmen), employees of the Central of Georgia Railway Company, its successors and assigns."[7]

II.

The Work in Dispute

The 1958 SUNA contract at issue here involves yard work at Rome, Cedartown, Griffin and Athens, Georgia. Prior to the 1956 certification of SUNA, and during the BRT representation, the agreements with the Railroad gave substantial rights to *roadmen* (conductors and brakemen) to do yard work at these locations.[8] In brief, under

judicially reviewable. Switchmen's Union of North America v. National Mediation Board, 1943, 320 U.S. 297, . . . S.Ct. . . . , 88 L.Ed. 61. Of critical importance in this case is this provision of the section:

"* * * Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. * * *"

7. Section 1 (§151) Sixth states:
"The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

8. ROME: Contract of September 10, 1952, between ORCB, BRT and Railroad. Roadmen do that work, road conductors filling foremen's jobs and road trainmen filling switchmen's job. Assignment is in accordance with their standings on the respective conductors' and trainmen's *road seniority* rosters. No *yard* seniority is accumulated but right to that work is based upon *road* seniority.
CEDARTOWN: 1946 agreement between BRT and Railroad similar to Rome. By practice it applies to conductors as well. Yard work is assigned on the basis of *road* seniority, but no *yard* seniority has accumulated.
ATHENS: Contract August 1, 1952, between BRT and Railroad. This covers performance of *extra* yard work but regular yard duties have been by custom and practice performed by such road trainmen.
GRIFFIN: Substantially the same as Athens.

these agreements or practices roadmen perform yard work in accordance with their relative standing on the *road* seniority rosters. The senior man on the *road* list has priority over the junior man to do the *yard* work, but he does not acquire any *yard* seniority in doing it.

III.

The New Bargaining Representative Seeks Change

After SUNA's 1956 certification it sought to change the contracts as to these locations. In the fall of 1956 the Railroad gave, but later withdrew, a Section 6 (§156) notice to BRT and ORCB. Subsequently when conferences seemed to be unavailing, SUNA in 1958 gave the Railroad notice of a strike, which precipitated the mediation machinery of the Act. As a result of this mediation, conducted by the Mediation Board with SUNA and Railroad only,[9] the 1958 SUNA agreement attacked here, was reached.

The 1958 agreement gave this yard work to yardmen only. Roadmen (numbering 12 men) then doing yard-work were given an election to become yardmen. But if the election was accepted, they had to retire from road work. Appellants' brief describes this as a Hobson's choice. "Thus, those presently in the yard who 'elect' to become exclusive *yardmen* must give up their *road* seniority and those who 'elect' to become exclusive *roadmen* must surrender their right to

9. The Railroad sought to persuade the Mediation Board to invite BRT and ORCB to attend these negotiations. The Board declined apparently because such delegates could serve no useful function.

work in the *yard* in accordance with their road seniority standing." As to roadmen not presently doing yard work, full or part time, no right to "elect" to become yardmen was extended. These men, totaling approximately 175 were, however, actually affected since the others (numbering 12 men) exercising their election to do road work and abandon yard work, would "roll," "pull" or "bump" roadmen engaged in road work junior to them on the road seniority.

IV.

SUNA's Exclusive Right to Bargain

BRT and ORCB do not contend that the prior agreements (or practices) were perpetual. On the contrary, they recognize, as the written agreements expressly stated; and as the Act implies in any case, 46 USCA §158-Eighth, that each agreement would remain in effect subject to the provisions of the Railway Labor Act. SUNA, succeeding as bargaining representative, succeeded BRT in the administration of these contracts. As successor bargaining agent, it could change them, but until changed, they would remain in effect. And, decisive here, SUNA and the Railroad knew that change was forbidden[10] unless Section 6 was satisfied.

10. Section 2 (§152) Seventh provides:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 [6] of this title."

A violation of Section 2 (§152) Seventh, which in turn requires compliance with Section 6 (§156), is a criminal offense under Section 2 (§152) Tenth.

In assaying the attack on the contract, we think it vital to emphasize the right to bargain as it bears on the necessity for Section 6 (§156) notice. After certification the only "representative" with whom the Railroad may bargain and make a contract is SUNA. *Brotherhood of Railroad Trainmen v. Smith*, 6 Cir., 1958, 251 F.2d 282, cert. denied, 356 U.S. 937, 78 S.Ct. 778, 2 L.Ed.2d 812; *Switchmen's Union of North America v. Southern Pacific Co.*, 9 Cir., 1958, 253 F.2d 81. Once certified, it is the exclusive bargaining agent[11] for members of that class or craft. The effect of Section 2-Ninth, 16 USCA §152-Ninth, note 6, *supra*, is that it has "commanded the carrier to treat with the representative so certified" and "* * * requires the employer to meet and confer with the authorized representative of its employees" and secures "settlement of labor disputes * * by preventing * * bargaining with any who do not represent them * * *" the result being that the Act "* * * imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." *Virginian Ry. v. System Federation No. 40 AFL*, 1937, 300 U.S. 515, 546, 548, *supra*.

Of course, the craft or class represented is to be determined on functional and operational lines, not by the nor-

11. Section 2 - §152 - Fourth provides that:

"The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

Section 2 - §152 - Second provides:

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

mal activity of the members of a labor union some of whose members may do some or all of the work in question. This is graphically illustrated by the cases arising under the 1954 Union Shop Amendments, Section 2-Eleventh, 45 USCA §152 Eleventh, as to which both the Ninth and Sixth Circuits have held that a union whose members perform work of another craft for which another union has been certificated, cannot legally negotiate with the railroad for its own members. And any such contract, if made, is illegal and unenforceable. *Brotherhood of Railroad Trainmen v. Smith*, 6 Cir., 1958, 251 F.2d 282, cert. denied, 356 U.S. 937, 78 S.Ct. 778, 2 L.Ed.2d 812 (trainmen, members of BRT, doing conductor work and having seniority of a conductor); *Switchmen's Union of North America v. Southern Pacific Co.*, 9 Cir., 1958, 253 F.2d 81 (trainmen, members of BRT, doing yard work may be affected only by contract with SUNA, the yardmen's certified bargaining agent.)

Consequently, while under the pre-1956 practice, the right of given individuals to perform yard work may depend on road seniority, the work in question is that of yard work, i.e., that done by switchmen and foremen generally. As to that work, SUNA alone may bargain. When and as it bargains, it may do nothing which alters or disturbs road work activities wholly within the bargaining prerogative of the other unions—but it may affect those who, while generally roadmen, perform yard work, full or part time. The impact, though, is not by reason of road work, or road status, road seniority, or membership in a road union. It is simply that in order to perform yard work—a matter within SUNA's exclusive prerogative—the persons must meet

the qualifications prescribed in the yard contract. What that contract shall be; what its terms shall be, is a matter wholly between the carrier and the certified bargaining agent for that type of work. Others may claim to be entitled to notice, but they cannot bargain, and they do not have the right to set in train the successive statutory machinery of mediation.

The inevitable necessity for this is inescapably demonstrated by the context of this record. If, because its members have previously been permitted to do yard work, BRT may now confer, negotiate and bargain with the carrier to assure continuation of such work or any other supposed fair share of it, the ORCB may do likewise. Since there can be no real bargaining if it is not intended that a contract result, a right in BRT and ORCB to bargain would necessarily require that each could make a contract specifying for its members how much and what part of the yard work they would perform, and at what pay and on what terms. SUNY could, of course, do likewise. By the sheer fact that 100% is the maximum that can be made of a whole, to whatever extent BRT's contract, and that of ORCB, covered a percentage of the allocable and available yard work, SUNY would not be making a contract. Indeed, it would not be bargaining. And to that extent it would not be the exclusive bargaining agent for all, whether members of SUNY, BRT, ORCB, or just plain non-union workers.

If the statutory investment of exclusive bargaining power in the Union certified by the Mediation Board, note 6, *supra*, can be whittled down for a labor union which has

lost its certified status, then those individuals who decline to belong to any union, or who belong to another labor organization meeting the requirements of a union shop, 45 USCA §152-Eleventh, are likewise entitled to notice and the right to confer and bargain.

Then would we indeed have chaos, and the bargaining table to determine labor matters in railroad operations would degenerate into a tower of Babel controversy on *who* was to do the *talking*. That controversy is, of course, committed to the sole and exclusive resolution of the Mediation Board. *Switchmen's Union of North America v. National Mediation Board*, 1943, 320 U.S. 297, . . . S.Ct. . . . , 88 L.Ed. 61.

We are, therefore, firm that SUNA was the exclusive bargaining agent covering the yard work. It represented all who did the work whether they were members of SUNA, BRT, ORCB or members either of no union or one satisfying a union shop.

V.

Section 6 Notice Not Required

We are equally firm that under these circumstances BRT and ORCB were not entitled to a Section 6 (§156) notice. The emphasis by them of the use of plurals in the Section's reference to carriers and representatives and parties interested in such intended changes is misplaced. This was but a recognition by Congress that in the history of railroad labor problems, the threat to the public interest

came frequently from system-wide or nationwide strike threats of several crafts or brotherhoods. It was also a recognition of the fact in railroad life that men float from one craft to another while belonging to but one union. *Pennsylvania R.R. v. Rychlik*, 1957, 352 U.S. 480, 77 S.Ct. 421, 1 L.Ed.2d 480. Such language was to provide nothing more than a notice *by* whatever carrier or carriers proposed a change, or whatever craft union or unions proposed a change. Conversely, the notice *by* such party or parties was to be given *to* the carrier or carriers to be affected or to the craft union or unions having the bargaining authority for the work actually involved in the proposed changes.

"An analysis of the bargaining process refutes the idea that the 'parties interested in such intended changes' would or could include all those persons who might be affected by the changes or the unions of which they were members. That the notice requirement is directly related to bargaining as such is shown by the very words of Section 6 *note supra* compelling 'Notice of an intended change in agreements affecting *rates of pay, rules, or working conditions*.' * * \." The words emphasized by us are a shorthand abbreviation of labor bargaining.

By both *Virginian R. v. System Federation No. 40, AFL*, 1937, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789, *supra*, and *Shreveport's Union of North America v. National Mediation Board*, 1943, 320 U.S. 297, ___ S.Ct. ___, 88 L.Ed. 61, *supra*, we are told that the source of friction which was the complete stumbling block to industrial railroad peace was controversy over *who* was to bargain. To eliminate that Con-

gress, in Section 2 (§152)-Ninth, provided that the Mediation Board would determine and certify the bargaining agent. And, as pointed out above, upon that certification the carrier was to *treat* with that representative and no other. To treat is to bargain. It is this process of bargaining which the Court describes in its analysis of the term to 'treat with.'" The command to the employer to 'treat with' the authorized representative of the employees adds nothing to the 1926 Act, unless it requires some affirmative act on the part of the employer * * . * * The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by §2, First." *Virginian Ry. v. System Federation No. 40 AFL*, 1937, 300 U.S. 515, 547-48, *supra*.

Since the carrier is enjoined to "treat," i.e., bargain, only with the certified representative, the question arises—of what use is the notice to those not permitted to negotiate and confer? If a recently displaced union is entitled to be present—what may it do? Under the Act it may not negotiate, for that is left exclusively to the certified agent.

If a displaced union is entitled to notice merely to sit and observe because the interest of its members in doing the

work of another craft might be adversely affected, would not the same right exist in each and every individual not a member of any union, or a member of some other union satisfying a union shop? Here we are back to chaos. Chaos not only in the attempted negotiations, but in the administrative machinery for notification, the place and time of meeting, and the like.

In *McMullins v. Kansas, O. & G. Ry.*, 10 Cir. 1956, 229 F.2d 50, the plaintiff engineers included those who were members of the certified bargaining brotherhood and others who were members of another union since displaced. They attacked the validity of a contract made by the bargaining agent which had the effect of compulsory retirement for age as to them. The Court rejected the contention that the agreement was invalid because the required notice was not given. "The bargaining agent is the representative of the craft and is not required to consult with the individual members or to give them notice of contemplated contractual actions within the scope of its authority. It has the authority to bind its principal, if it acts within the statutory provisions. * * * Obviously [Section 6] is not intended as a restriction of the bargaining agent or a requirement of personal notice to employees. Its purpose is to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract." 229 F.2d 50 at 56.

If the individual affected has no right to notice, to negotiate, to confer, hence to bargain, then his union has

no greater right. For as to actual work of a kind committed to another craft, such uncertified union not only may not, it cannot, legally negotiate for its members. *Brotherhood of Railroad Trainmen v. Smith*, 6 Cir., 1958, 251 F.2d 282, 287; *Switchmen's Union of North America v. Southern Pacific*, 9 Cir., 1958, 253 F.2d 81, 84.

Section 6 is a part of a carefully designed mechanism to effectuate the purpose of Congress to permit railroad laborers doing particular work to choose their own representative freely, to have the bargaining done for all such workers whether members or not, by the elected, certified agent, and to supply the governmental machinery of mediation between such adversaries. Notice by one to the other prohibits *unilateral* changes. But it does not—it was not meant to—weaken or detract from the authority or responsibility of the certified agent to speak with a clear and final voice on behalf of all who do that actual work.

To sustain this contention BRT and ORCB would be for us to hold that while they were not entitled to confer, to discuss, to negotiate, to bargain with the carrier, they were entitled to know that the duly elected and certified bargaining agent for all yard workers was considering a change. Of course, the act of certification gave the new bargaining agent that power and duty. BRT and ORCB were charged with knowledge of that. They were not entitled to further notice so they could circumscribe or direct or control the negotiations of the agent which their own members had, in the eyes of the law, selected.

Since they could perform no proper function in the negotiations of which they could not be a part, the absence of BRT and ORCB from the negotiations and the failure of the Railroad to give them notice cannot have made the contract invalid. In the limited role which the judiciary plays in these railroad labor disputes, the District Court was right.

AFFIRMED.

JUDGMENT

Extract from the Minutes of June 30, 1959

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN and BROTHERHOOD OF RAILROAD TRAINMEN

No. 17588

versus

SWITCHEMN'S UNION OF NORTH AMERICA, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

ORDER DENYING REHEARING

Extract from the Minutes of August 10, 1959

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN and BROTHERHOOD OF RAILROAD TRAINMEN

No. 17588

versus

SWITCHMEN'S UNION OF NORTH AMERICA, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * *

RAILWAY LABOR ACT

Section 151. Sixth (1. Sixth)

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

Section 152. Second (2. Second)

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Second 152. Fourth (2. Fourth)

"Fourth. Employees shall have the right to organize and bargain collectively through represetatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collecting bargaining, or in performing any work therefor, or to influence of coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct

from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 152, Seventh (2, Seventh)

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 152, Ninth (2, Ninth)

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees

involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election, and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 152. Tenth. (2. Tenth)

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney, to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations

thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such individual employee of such labor or service, without his consent."

Section 156 (6)

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after terminination of conferences without request for or proffer of the services of the Mediation Board."

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SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1959

No. 393

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN
and BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioners

vs.

SWITCHMEN'S UNION OF NORTH AMERICA
and CENTRAL OF GEORGIA RAILWAY COMPANY,
Respondents

BRIEF OF CENTRAL OF GEORGIA RAILWAY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN B. MILLER
JULIAN C. SIPPLE
Attorneys for Respondent
Central of Georgia Railway Company

Post Office Box 527
Savannah, Georgia

November 10, 1959

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1959

No. 393

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN and BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioners

vs.

SWITCHMEN'S UNION OF NORTH AMERICA and CENTRAL OF GEORGIA RAILWAY COMPANY,
Respondents

BRIEF OF CENTRAL OF GEORGIA RAILWAY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT

This Respondent (the "Railroad") desires to supplement Petitioners' ("Conductors" and "Trainmen") statement of the case in order that the narrow issues which Petitioners seek to have this Court review will be a little more clearly set forth.

The Railroad will not be seriously affected one way or the other by the outcome of this litigation. It actually involves a dispute between the Conductors and Trainmens' organizations on the one hand and the Switchmen's Union of North America ("SUNA") on the other. However, the Railroad considers as valid

and binding the Mediation Agreement hereinafter referred to and which it made with SUNA. Consequently the Railroad is standing behind said Agreement and is supporting the position of SUNA in this litigation.

Here we have SUNA taking over from the Conductors and Trainmen the representation on the Railroad of those employees engaged in what is termed "yard work." It is yard work alone that is involved in this case. The SUNA representation came as the result of an election it invoked (Pl. Ex. 1; R-407) and which was conducted in 1956 on the property of Central of Georgia Railway Co. by the National Mediation Board in accordance with the Railway Labor Act (45 U.S.C.A. Sec. 152, Ninth). Subsequently, that is a little over two years later, a second election was conducted at the instance of the Trainmens' organization on the Railroad's property (Ex. 1-1; R-412) and as a result thereof SUNA was continued as the representative under the Railway Labor Act for the purpose of bargaining and negotiating on behalf of those employees on the Railroad engaged in yard work (R-474).

At a time following its first becoming, that is its certification by the Mediation Board as the representative of the craft of employees in yard work, SUNA made certain requests upon the Railroad for changes in the contracts (Exs. A, B, and C; R-42-46) the Railroad had previously made with the Conductors and Trainmen and in practices which had been followed with regard to work at the Rome, Cedartown, Athens and Griffin, Georgia yards of Central of Georgia Railway. The agreements, as is customary, pro-

vided that they were to remain in effect "subject to the provisions of the Railway Labor Act." These contracts were "inherited" by SUNA when it became the representative of yard employees, that is, Switchmen, yard foremen, etc. on the Railroad. Following the first request of SUNA for the changes referred to, the Railroad in September 1956 gave the Conductors and Trainmen what has come to be known as a Section 6 Notice under the Railway Labor Act (45 U.S.C.A. Sec. 156) of the fact that the Railroad proposed to cancel all agreements with the Conductors and Trainmen as well as all practices regarding the yards in question (R-88), this in order to comply with the aforementioned request of SUNA. Later on this Section 6 Notice was withdrawn by the Railroad (Ex F; R-90) inasmuch as a dispute arose between the Railroad and the Conductors and Trainmen over this matter. The Conductors and Trainmen and SUNA were all advised by the Railroad that they should endeavor to work out the matter as promptly as possible without further involvement of the Central of Georgia. The latter took the position that it was under no legal duty to in the first instance have given this Section 6 Notice to the Conductors and Trainmen, the Railroad's Director of Personnel also explaining that he sent the Notice in order to bring SUNA's request for changes "right in the open" (R-162, 179) and as he anticipated a controversy over the request.

Notwithstanding SUNA's 1956 request for changes as already mentioned and which were not made, matters rocked along until 1958 when SUNA, following negotiations which had been resumed, threatened a strike against the Railroad account of the Railroad's failure

to make the changes which SUNA desired at the yards which have been referred to. The services of the National Mediation Board were invoked at this juncture and as a result of the mediation an agreement (Ex. D: R-46) was made March 14, 1958 by the Railroad with SUNA and under which the latter's request for changes was made, these changes to become effective April 5, 1958. The Circuit Court of Appeals at page 5 of its decision affirming the lower Court's ruling in favor of SUNA had this to say with regard to the effect of the Mediation Agreement upon certain Conductors and Trainmen:

> "The 1958 agreement gave this yard work to yardmen only. Roadmen (numbering 12 men) then doing yard work were given an election to become yardmen. But if the election was accepted, they had to retire from road work. Appellants' (Conductors and Trainmen) brief describes this as a Hobson's choice. 'Thus, those presently in the yard who "'elect'" to become exclusive yardmen must give up their road seniority and those who "'elect'" to become exclusive roadmen must surrender their right to work in the yard in accordance with their road seniority standing.' As to roadmen not presently doing yard work, full or part time, no right to 'elect' to become yardmen was extended. These men, totaling approximately 175 were, however, actually affected since the others (numbering 12 men) exercising their election to do road work and abandon yard work, would 'roll', 'pull' or 'bump' roadmen engaged in road work junior to them on the road seniority."

No Notice, Section 6 or otherwise, was given by the Railroad to the Conductors and Trainmen prior to the execution of the March 14, 1958 agreement, nor did representatives of the Railroad confer or ne-

gotiate with the Conductors and Trainmen about such changes, though during the mediation the Railroad's representatives suggested to the Mediator that he invite the Conductors and Trainmen to attend the mediation conferences. The Mediator declined to do so, taking the position that the Conductors and Trainmen not being the representative under the Railway Labor Act of the class or craft of employees involved, had no place in the negotiations (R-466).

On March 18, 1958 a letter (Ex. 1-13; R-444) was sent by the Railroad to the Conductors and Trainmen advising of the March 14, 1958 agreement with SUNA and transmitting a copy thereof to each of them. Shortly after the Conductors and Trainmen were notified of the Mediation Agreement there followed litigation between all of the parties. SUNA, fearing a delay which it appeared would develop on the part of the Railroad in making the agreement effective, sued in the District Court for the Southern District of Georgia on March 25, 1958 for an injunction against a delay and also to enjoin the Railroad from negotiating, dealing or conferring with the Conductors and Trainmen about the matter. Through a proceeding brought in the Superior Court of Bibb County, Georgia, March 31, 1958, certain members of the Conductors and Trainmens' organizations enjoined the Railroad and certain individual members of SUNA from putting the Mediation Agreement into effect, and from altering the practices then in effect at the Railroad yards in question. Subsequently the Conductors and Trainmen intervened in the District Court proceeding in the Southern District of Georgia and the action brought in Bibb Superior Court (this in

the meantime had been removed to the District Court for the Middle District of Georgia) was dismissed by those who initiated it. The case in the Southern District of Georgia was transferred to the Middle District, where it was tried over a two-day period. Briefs were later filed and the Court upheld the Mediation Agreement between the Railroad and SUNA and denied the prayers of the intervening Conductors and Trainmen. On appeal the Fifth Circuit Court affirmed the trial Court (269 Fed. 2d 726).

QUESTIONS PRESENTED

1. Notwithstanding that SUNA in 1956 had been certified by the National Mediation Board as the duly accredited representative of yard service employees on Central of Georgia Railway and was, therefore, the organization authorized to deal, treat and negotiate with the Railroad as to pay, rules or working conditions affecting yard service employees, were the Conductors and Trainmen, as the replaced representatives of employees in this class of service, entitled under the Railway Labor Act to and should they have been given a Section 6 Notice by the Railroad of the latter's intention to make the changes provided for in the March 14, 1958 Mediation Agreement with SUNA?

2. Was the Railroad under the particular circumstances of this case required by the provisions of the Railway Labor Act (45 USCA 152, Ninth) to treat only with SUNA as representative of the class or craft of employees on the Central of Georgia engaged in yard work?

3. Was the Mediation Agreement entered into by the Railroad with SUNA and relating to yard work,

valid and binding under the Railway Labor Act, notwithstanding its alleged adverse effect upon certain employees who from time to time engaged in both yard and road work and who held membership in and were represented by either the Conductors or Trainmens' organizations?

REASONS FOR DENYING THE WRIT

1. Petitioners, in order to secure a review by this Court of the decision below would, among other contentions, have it appear that there is a conflict between the Fifth Circuit's decision and those of other Courts of Appeal upon the questions here involved. This is not so. The case of *Brotherhood of Railroad Trainmen v. Howard*, 191 Fed. 2d 442, cited at page 19 of the petition for certiorari, was decided by this Court in 1952 (343 U.S. 768). It in no way involved a situation such as that now being dealt with. In *Howard* the Court was primarily concerned with acts of a union in contracting with a Railroad which were held to be a discriminatory bargaining device to oust negro train porters from their jobs. There is simply no basis for even comparing the present litigation with the *Howard* case or attempting to set up such a conflict as would suggest the granting of the writ. Reduced to the basic issue therein the case now under consideration involves, as the Circuit Court stated, the question as to "whether the Mediation Agreement between SUNA and the Railroad "is invalid because the Railroad failed to give a Section 6 Notice to the BRT and ORCB." This Court stated in *Howard* that the view it took of the litigation made it unnecessary to consider the question of whether the notice given by the Railroad to the train porters there involved was in-

sufficient to meet the requirements of Section 6 of the Railway Labor Act (45 USCA Sec. 156), but there the carrier was concerned with two separate and distinct crafts — train porters and ordinary brakemen. Each of these crafts had its own separate representative for purposes of the Railway Labor Act. Here we have but one craft of employment, that is yard service, and only one duly accredited bargaining representative (SUNA) for that craft.

Like the *Howard* case, that of *Rolfes v. Dacellinghaim* (198 Fed 2d 591) also involved two separate crafts — "Waiters-in-Charge" and "Dining Car Stewards." Under an arbitration, positions sometimes held by Waiters were given to Stewards. The Waiters complained that they were entitled to notice of the arbitration and to participate therein because their jobs were affected. The *Rolfes* case, in order to "conflict" with the Circuit Court's decision petitioners now seek to have reviewed, would of course, have to involve "the same matter" as that expression is used in this Court's Rule 19 (b). *Rolfes*, while in part having to do with a Section 6 Notice, concerned a situation where, as the 8th Circuit Court stated, "the Railroad undertook to change (its) *agreements* with the *two classes* of (its) employees without giving the 30-day notice required by Section 6 of the Railway Labor Act." Here again we have an important distinguishing factor in that the case now under consideration involves only one class of employees or craft, that is, yard men and yard work.

2. The Conductors and Trainmen in the last paragraph at page 19 of their petition, refer to *Brotherhood of Railroad Trainmen v. Smith*, 251 F 2d 282,

decided by the Sixth Circuit Court, and make the statement that the Fifth Circuit decision here under consideration is contrary to that in ***BRT v. Smith***, specifically forbidding any negotiation by a bargaining agent which affects rights of another craft. There is no such conflict, as will appear from the following language found at page 8 of the Fifth Circuit's opinion:

> "* * * *both the Ninth and Sixth Circuits have held that a union whose members perform work of another craft for which another union has been certificated, cannot legally negotiate with the railroad for its own members.* And any such contract, if made, is illegal and unenforceable. Brotherhood of Railroad Trainmen v. Smith, 6 Cir., 1958, 251 F. 2d 282, cert. denied, 356 U.S. 937, 78 S.Ct. 778, 2 L. Ed. 2d 812 (trainmen, members of BRT, doing conductor work and having seniority of a conductor); Switchmen's Union of North America v. Southern Pacific Co., 9 Cir. 1958, 253 F. 2d 84. (trainmen, members of BRT, doing yard work may be affected only by contract with SUNA, the yardmen's certified bargaining agent)." (Emphasis supplied).

3. There are no important unsettled questions of Federal law involved here as is contended by petitioners, nor did the Court below misinterpret or misapply the Railway Labor Act as claimed at page 8 of petitioner's application for certiorari. The holding by both the trial and the Circuit Court that the Conductors and Trainmen were not entitled to a Section 6 Notice and that the Railroad in this instance could treat only with SUNA finds abundant support in decisions of this Court and to which we shall refer in the argument portion of this brief.

ARGUMENT

I.

On the Basis of Established Law the Court of Appeals Correctly Held that SUNA had the Exclusive Right to Bargain and Negotiate with the Railroad with Respect to the Change it Desired at the Yards in Question.

The Fifth Circuit's decision is a well-reasoned one and finds adequate support in the settled proposition that the certified representative of a railroad craft is the only union a carrier can validly deal or negotiate with. The Court of Appeals made this statement, which formed the very basis for its decision (269 F. 2d at pp. 730, 731):

"SUNA's Exclusive Right to Bargain.

* * *

"In assaying the attack on the contract, we think it vital to emphasize the right to bargain as it bears on the necessity for Section 6 (Sec. 156) notice. After certification the only 'representative' with whom the Railroad may bargain and make a contract is SUNA. Brotherhood of Railroad Trainmen v. Smith, 6 Cir. 1958, 251 F. 2d 282, certiorari denied 356 U.S. 937, 78 S. Ct. 778, 2 L. Ed. 2d 812; Switchmen's Union of North America v. Southern Pacific Co., 9 Cir. 1958, 253 F. 2d 81, cert. denied 79 S. Ct. 29, 358 U.S. 818. Once certified, it is the exclusive bargaining agent for members of that class or craft. The effect of Section 2-Ninth 45 U.S.C.A. Sec. 152-Ninth, note 6, supra, is that it has 'commanded the carrier to treat with the representative so certified' and '***requires the employer to meet and confer with the authorized representative of its employees' and secures 'settlement of labor disputes *** by preventing *** bar-

gaining with any who do not represent them *** the result being that the Act *** imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.' Virginian Ry. Co. v. System Federation No. 40 AFL, 1937, 300 U.S. 515, 546, 548, 57 S. Ct. 592, 599, 81 L. Ed. 789, supra."

In *Switchmen's Union of North America v. Southern Pacific Co., Brotherhood of Railroad Trainmen, et al* (253 F. 2d 81), the Ninth Circuit Court was concerned with another controversy between SUNA and the BRT somewhat akin to that we are now dealing with. It involved a dues check-off agreement made by the Southern Pacific Company with BRT and having application to certain yardmen (who were members of BRT) for whom SUNA was the exclusive bargaining representative. The Court held the contract to be a collective bargaining agreement and further that the Railroad violated its obligation to bargain exclusively with SUNA as to all matters pertaining to yardmen and yard work. This Court denied certiorari (358 U.S. 818), presumably on the basis of its holding in *Virginian Railway v. System Federation etc.*, 300 U.S. 515, where Mr. Justice Stone, in speaking for the Court, said at page 548:

"Both the statute (Railway Labor Act) and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. The obligation imposed on the employer by Sec. 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of Sec.

2. Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other."

II.

As the Railroad could not under the Act treat or Negotiate with any one but SUNA on Matters Pertaining to Yard Work, it Necessarily Follows that a Section 6 Notice to the Conductors and Trainmen with Regard to the Change Requested by SUNA was not Required.

On this proposition the Fifth Circuit's statement while the present litigation was before it and which follows, indeed possesses a look of logic. In a reference to Section 6 of the Railway Labor Act (45 U.S.C.A. Sec. 156), Judge Brown said at page 732:

"It was also a recognition of the fact in railroad life that men float from one craft to another while belonging to but one union. Pennsylvania R. Co. v. Rychlik, 1957, 352 U.S. 480, 77 S. Ct. 421, 1 L. Ed. 2d 480. Such language was to provide nothing more than a notice *by* whatever carrier or carriers proposed a change, or whatever craft union or unions proposed a change. Conversely, the notice *by* such party or parties was to be given *to* the carrier or carriers to be affected or to the craft, union or unions having the bargaining authority for the work actually involved in the proposed changes.

"An analysis of the bargaining process refutes the idea that the 'parties interested in such intended changes' would or could include all those persons who might be affected by the changes or the unions of which they were members. That the notice requirement is directly related to bargaining as such

is shown by the very words of Section 6, note 3, supra, compelling 'Notices of an intended change in agreements affecting *rates of pay, rules, or working conditions* ***.' The words emphasized by us are a shorthand abbreviation of labor bargaining."

Going back to the *Virginian Railway v. System Federation case*, supra. Since the Act imposed on the Railroad "the affirmative duty to treat only with the true representative (of the craft) and hence the negative duty to treat with no other," there is scarcely any room for the argument at page 8 of the Conductors and Trainmens petition for certiorari that there is no decision by this Court on the question of whether or not the Railroad should have given petitioners a Section 6 Notice. If the Railroad could not treat with the Conductors and Trainmen, as this Court said in the *Virginian Railway case*, then it certainly must follow that the Railroad was under no duty to give the Conductors and Trainmen a Section 6 Notice with respect to changes affecting only yard work and for which class of service SUNA was the exclusive representative.

III.

Even if the Mediation Agreement between the Railroad and SUNA should have an Adverse Effect upon some of the Conductors and Trainmen, This would not make the Agreement Invalid.

This Court long ago expressed the view that the statutory representative of a railroad craft is not barred from making contracts dealing with differences in seniority, etc. and stated further that while the representative of a craft has the duty to exercise fairly the power conferred upon it in behalf of all of those for whom it acts, such duty does not mean that the

statutory representative is barred from making contracts which may have an unfavorable effect on some of the persons for whom it is acting and who are working in the craft for which the representative is acting. (*Steele v. Louisville and Nashville RR Co.*, 323 U.S. 192, 203).

CONCLUSION

For the reasons stated herein and as the Conductors and Trainmen, as the Fifth Circuit stated, "could perform no proper function in the negotiations of which they could not be a part," the failure of the Railroad to give them notice cannot have made the Mediation Agreement invalid. The petition for certiorari should, therefore, be denied.

Respectfully submitted.

JOHN B. MILLER
JULIAN C. SIPPLE
Attorneys for
Central of Georgia Railway Company
Post Office Box 527
Savannah, Georgia

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Respondents.

BRIEF OF RESPONDENTS IN REPLY TO PETITION FOR A WRIT OF CERTIORARI

RALPH L. CRAWFORD
507 American Building
Savannah, Georgia

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BRIEF OF RESPONDENTS IN REPLY TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Petitioners, Order of Railway Conductors and Brakemen, hereinafter referred to as ORC and Brotherhood of Railroad Trainmen, hereinafter referred to as BRT are seeking to have this Court review a decision of the Fifth Circuit, which said Court sustained the decision of the District Court for the Middle District of Georgia in its finding that a contract was valid which was entered into between the

Switchmen's Union of North America, hereinafter referred to as SUNA and the Central of Georgia Railway Company, hereinafter referred to as the Railroad.

Petitioners seek certiorari due to the following reasons: (1) the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this court, and (2) that the Fifth Circuit's decision is in conflict with the decision of other circuit courts on the same matter. Each of these reasons governing review on certiorari to defeat the granting of the writ will be treated in that order.

IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE COURT.

The petitioners, ORC and BRT, claim that the opinion of the Fifth Circuit involves the scope of authority of the craft representative of a labor organization and the extent of the duty to provide a Section Six notice under the Railway Labor Act, 45 USC, Sec. 156 (Sec. 6) which has not been decided by this Court and because of their importance should be so decided.

The Court of Appeals in reaching their decision found certain facts to exist. The first and important fact found to exist was that the contract, the subject matter of this dispute, concerned and only affected the class or craft on the Railroad known as yardmen (foremen and switchmen) and in the alternative that said contract did not affect the class or craft known as roadmen or trainmen while these employees were so working in their respective class. The second fact found to exist, which is of equal importance, is the fact that SUNA was the duly certified bargaining representative for the yardmen, (switchmen and foremen) be-

ing properly certified by the National Mediation Board on the 25th of May, 1956.

The Fifth Circuit, after determining the above two facts, simply applied Section 2 (9) of the Railroad Labor Act, 45 USC Section 152 (Section 2) and determined that SUNA was the only representative duly authorized to bargain with the Railroad concerning rates of pay, rules or working conditions of the employees of the class of craft of yardmen (Foremen, Switchmen). The Court, in applying this section, followed this Court's ruling in Railway Employees' Department of American Federation of Labor vs. Virginia Railway Company, 300 U.S. 515, which case held "It (Section 2 Ninth of the Railway Labor Act; 45 USCA, Section 152 Ninth) provided a means for ascertaining who are the authorized representatives of the employees through intervention and certification by the Mediation Board, and commanded the carrier to treat with the representative so certified." The Court in this case also went one step further and stated that this Section 2 Ninth imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no others.

This same interpretation of Section 2 Ninth has also been applied in other Circuit Courts of Appeals in the cases of Brotherhood of Railroad Trainmen vs. Smith, 6 Cir., 1958, 251 F2d 282, Cert. denied, 356 U.S. 937, 78 S. Ct. 778, 2 L.Ed. 2d 812; and Switchmen's Union of North America vs. Southern Pacific Company, 9 Cir., 1958, 253 F.2d 81 which cases also held that once certified, the bargaining representative is the exclusive bargaining agent for members of that class or craft.

Therefore, from the above authorities, it is readily determinable that the interpretation and meaning of Section 2 Ninth of the Railway Labor Act has already been determined by this Court as well as other Circuit Courts of

Appeals; that there is no conflict in the decision, and having once been determined there is no need for this Court to review a decision when that decision is the same as this Court and other Circuit Courts.

The petitioners in attacking the decision of the Fifth Circuit in their writ of certiorari are relying on the cases of General Committee of Adjustment of BLE vs. Missouri-Kansas-Texas Ry. Co., 132 F.2d 91, 320 U.S. 523; Brotherhood of Railroad Trainmen vs. Howard, 190 F2d, 442, 8 EN Cir. affirmed, 343 U.S. 768; Rolfes vs. Dwellington, 198 F2d 519, 8th Circuit, which cases have factual situations different from the present controversy and are not authorities for the present case. As has been previously stated, the contract in dispute affected only the class or craft on the Railroad known as yardmen (foremen and switchmen). Under the terms of this contract, rights in the craft or class of roadmen and trainmen were not affected as long as the employees were working in their respective class. This is true due to the fact that the class or craft represented is to be determined on functional and operational lines and there is no connection between the work of roadmen and trainmen and the yardmen. The above cases relied on by petitioners have factual situations clearly distinguishable from the present case in that the employees of the carrier in the case relied on by petitioners were all performing the same or interchangeable duties. In the MKT case, the Court dealt with the situation where demoted engineers performed firemen's duties and promoted firemen performed engineer's duties. There both class or crafts were performing interchangeable duties which made it imperative that, the status of a demoted engineer to firemen would affect the class represented by the firemen and vice versa. In the Howard case, the Court was faced with a situation where parties, even though represented by a different bargaining

representative, were performing the same duties as brakemen and in reality were brakemen but were designated porters due to the fact that they were all negroes and were not allowed to be represented by the brakemen. Irrespective of this fact, their sole and only means of employment on the railroad was that of performing brakemen's duties, the functional and operational duties of the two were identical. As to this case, it should be pointed out that it turned solely on racial discrimination and has no application to the present controversy.

The Rolfes vs. Dwellington case contains a similar factual situation in that waiters-in-charge by long established customs and usage with the railroad had performed dining car steward's work and here again even though they were represented by a different bargaining representative, their operational and functional duties were identical, which any contract by the carrier with one group that affected the other's rights, then that group would be an interested and necessary party especially if it was abolishing their jobs. This case also involved a jurisdictional dispute question which is absent in our present controversy, and the validity of the contract was not decided.

Due to the difference in the factual situation involved in the above cases cited and relied on by the petitioners and the factual situation in this present controversy, this Court can readily distingish these cases and can apply the cases which are applicable to this factual situation namely, Railway Employee's Department of American Federation of Labor vs. Virginia Railway Company, 300 U.S. 515, Brotherhood of Railroad Trainmen vs. Smith, 6 Cir. 1958, 251 Fed2d 282, Cert. denied, 356 U.S. 937, and Switchmen's Union of North America vs. Southern Pacific Co., 9th Cir. 1958, 253 F.2d 81 and determine that the question has al-

ready been decided by this Court and various circuit courts in denying petitioners writ of certiorari

SECTION SIX NOTICE NOT REQUIRED

The petitioners are also seeking review of the circuit court's opinion which opinion determined that a Section 6 notice under the circumstances of this case was not required to be given by the Railroad to ORC and BRT before the contract in dispute would be valid.

Section 156, known as Section 6, provides that "carriers and representatives of the employees shall give at least thirty days written notice of intended change in agreements affecting rates of pay, rules or working conditions, and the time and place for the beginning of conference between the representative of the parties interested in such intended change shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice."

Taking into consideration that this Court has not rendered a decision as to the meaning and application of this notice such decisions have been rendered by the Circuit Courts and the opinion as rendered in this case by the Fifth Circuit is in harmony with other circuit courts opinions.

Once again re-emphasizing the fact that this agreement affected only yard positions and only affected the members of ORC and BRT when they were performing these positions in the yard, taking into consideration the operational and functional duties they then performed which would place them in the craft or class known as yardmen (foremen and switchmen), then in accordance with decision of the Circuit Courts, the BRT and ORC were not entitled to a Section 6 notice. In the case of McMullins vs. K.O. & G.R.

Co., 229 F2d 50 (10 Cir.) the court, as did the Fifth Circuit in this case, went into the history and purpose of this section and concluded on page 56 that "the bargaining agent is the representative of the craft and is not required to consult with the individual members or to give them notice of contemplated contractual action within the scope of its authority. It has the authority to bind its principles, if it acts within the statutory provisions. Section Six of the Railroad Labor Act has no application here. 45 U.S.C.A. 156. This Section requires the carriers and the bargaining representatives to give thirty days notice of any intended changes in the agreements affecting pay, rules and working conditions. This fixes the time and place for the beginning of a conference between the representative of the railroad and employees. Obviously it is not intended as a restriction of the bargaining agent or a requirement of personal notice to the employees. Its purpose is to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract."

The record is clear in this case that the Section 6 notice was not required to ORC and BRT as it shows that conferences were held between the carrier and the duly authorized representative of the class or craft affected and was even conducted under the auspices of the National Mediation Board. (R-163). It should also be noted that the record shows that the National Mediation Board informed the Carrier that the ORC and BRT were not proper parties to negotiate in reference to the contract and should not be notified of such (R-166).

Since the Fifth Circuit Court of Appeals in this case has properly interpreted and applied the requirement of a Section Six notice, and the Eighth Circuit Court of Appeals in the McMullins case, supra, has applied the same interpretation and meaning, the question of interpretation and ap-

plication has been properly decided and is not such a question as to warrant this court to review these decisions.

CONFLICTING DECISION BY DIFFERENT COURTS OF APPEALS

The second reason for petitioners seeking review is that the decision as rendered by the Fifth Circuit Court of Appeals in the present controversy is in conflict with decision of other circuits namely, Brotherhood of Railroad Trainmen vs. Howard (8th Cir.) 191 F2 442, Rolfes v. Dwellington, 198 F2d 591 and Brotherhood of Railroad Trainmen vs. Smith, 251 F2d 282. As has been previously noted in this brief, the petitioners are attempting to make the facts of this controversy fit the facts in the above cases to create a conflict in opinions of the different circuits.

The Fifth Circuit correctly applied the facts existing in this case to be that employees of the carrier known as roadmen and trainmen were working outside of their craft in the yard under pre-existing agreements with the carrier which agreements were entered into by the BRT when this union represented both crafts, roadmen and yardmen; that upon certification by the National Mediation Board of SUNA to represent the yardmen, these contracts were taken over by SUNA; that the negotiations and the contracts entered into between the carrier and SUNA only affected the craft of yardmen and since this certification, SUNA was the only duly certified bargaining representative of the yardmen, the Court properly applied the cases of Virginia Ry vs. System Federation No. 40 AFL, 1937, 300 U.S. 515 supra; Brotherhood of Railroad Trainmen v. Smith, 251 F2d 282 supra, Switchmen's Union of North America v. Southern Pacific Co., 253 F2d 81 supra which cases are clearly applicable to the factual situation in the present controversy and the

cases as relied upon by the petitioners clearly cannot be quoted as authorities in this case.

Therefore, since the decision reached in the cases cited by petitioners turn upon different factual situations, they are no authority for the present, their decisions are not in conflict with the decision of the Fifth Circuit and present no conflict of decisions for this Court to review.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

RALPH T. CRAWFORD

508 American Building

Savannah, Georgia

STATE OF GEORGIA.
CHATHAM COUNTY

I do hereby certify that I have this day served the Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen with a copy of this Brief by mailing same to their counsel of record, Benning Grice at his office in Macon, Georgia and the Central of Georgia Railway Company by mailing same to its counsel of record, Julian Supple at his office in Savannah, Georgia, with sufficient postage attached to insure its delivery.

This ____ day of ____ 1959